



Key Laws That Require Consultation

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Consultation "Triggers"



- Trust Responsibility
- Treaty Reserved Rights
- Laws
 - NHPA, ARPA, NAGPRA, AIRFA, NEPA
- Executive Pronouncements
 - Executive Orders:
 - Sacred Sites
 - Consultation
 - Environmental Justice
 - Preserve America
 - Cooperative Conservation
 - Presidential Memos on Government-to-Government Relations

Origins of the Indian Trust Responsibility: The Protagonists



Chief Justice Marshall



Andrew Jackson

Origins of the Indian Trust Responsibility



- *Cherokee Nation v. Georgia* (1831)
 - ❑ neither states nor foreign nations
 - ❑ “domestic dependent nations”
 - ❑ “in a state of pupilage”
 - ❑ stand as a “ward to his guardian”

Origins of the Indian Trust Responsibility



- *Worcester v. Georgia* (1832)
 - ❑ Tribes separate & distinct political communities
 - ❑ Tribes sovereign over lands retained
 - ❑ Treaties intended to ensure availability of sustainable, land-based, traditional existence
 - ❑ *Duty of protection* bargained for consideration for land cessions

Paternalism Run Amuck



- Guardian-ward language serves as rationale for “plenary power” doctrine
- Major Crimes Act (1885)
 - Federal jurisdiction over crimes committed by Indians in Indian country
 - First intrusion into internal affairs of tribe
- General Allotment Act of 1887 (The Dawes Act)
 - Power to abrogate treaties unilaterally
 - Congress’ “perfect good faith” presumed

The Duty of Protection



- Against what?
 - Then: unrelenting pressure of immigrant intrusion
 - Now: environmental and other threats to tribal lands, resources, burials, and tribal interests

Satisfying the Duty of Protection



- Narrow view:
 - U.S. owes *general* trust responsibility to Indian tribes, but...
 - Absent a specific obligation, duty is discharged by compliance with general laws and regulations not aimed at Indians
 - May be settled law in the Ninth and DC Circuits
- Query: **What's become of the duty?**

Satisfying the Duty of Protection

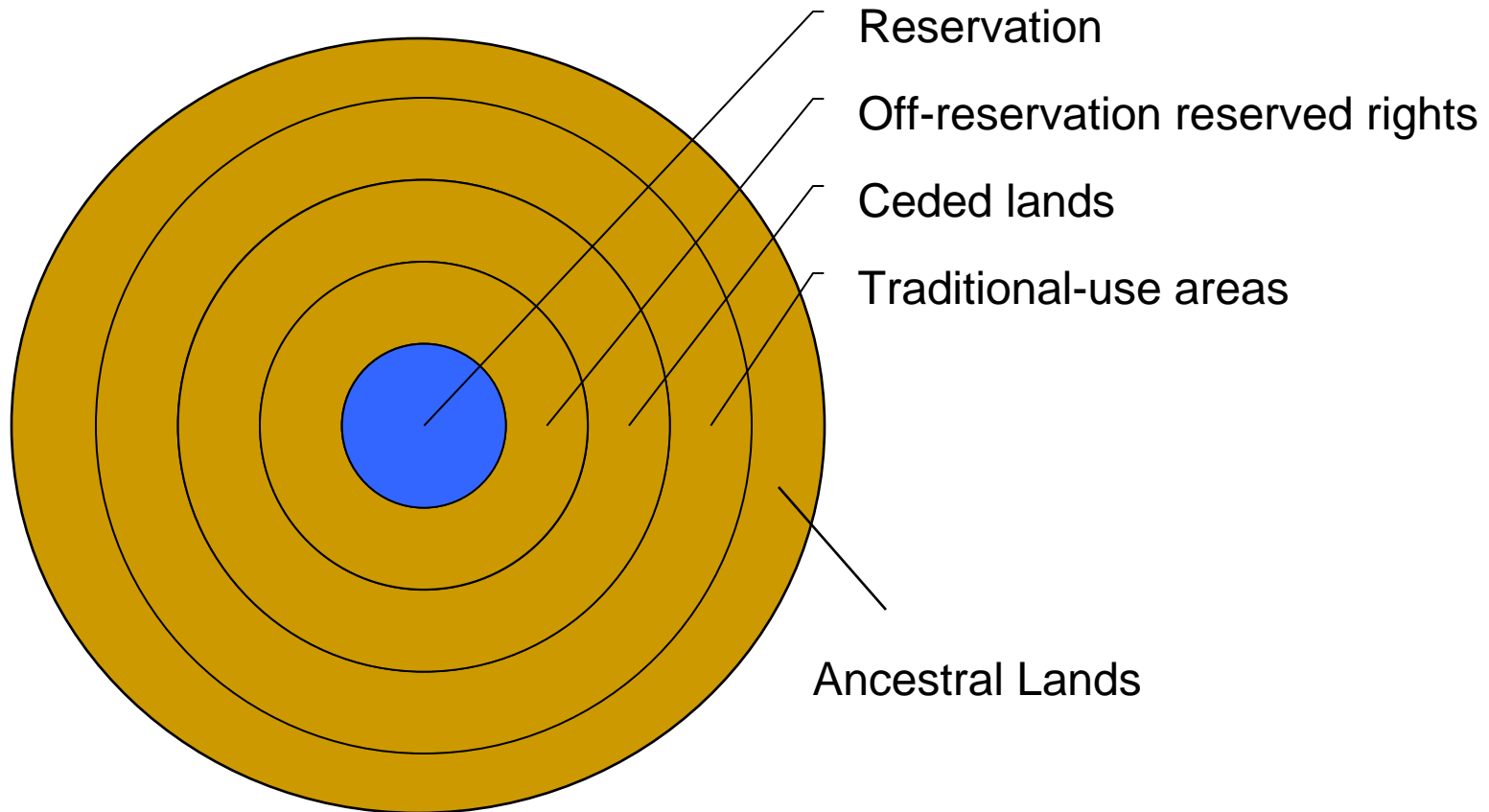


- Broader view:
 - ❑ Promise of protection “bargained for” consideration for land cessions
 - ❑ Compliance with laws of general applicability may not be enough
 - ❑ General trust responsibility may not be enforceable, but...
 - ❑ Agency discretion in imposing greater level of protection likely to be sustained

Exercising Discretion Consistent with the Duty



- Timber sales on former Klamath reservation
- Corps permit for fish farm in Lummi U&A
- Expansion of open-pit gold mine in Little Rocky Mountains
- Emergency regulation of off-shore salmon fishing
- Coal leasing near Northern Cheyenne



The Upshot



- Trust responsibility shared by all federal agencies
- Agencies have broad discretion to consider duty
- Discretion exercised to protect tribal lands, resources, and cultural properties will be upheld
- Obligation to consult when tribal lands, resources, or cultural properties at risk
- Duty of protection may not be limited to specific statutory obligations



*“Great nations, like great men,
should keep their word.”*

--Justice Hugo Black (1960)

Treaty Reserved Rights



- Treaties are not grants of rights to the tribes, but reservations of rights not surrendered
 - Implied rights (e.g., water)
 - Express rights (e.g., off reservation fishing)

- Treaty tribes and other tribes

National Historic Preservation Act (NHPA) 1966



- Purpose of NHPA:
 - Promote preservation
 - “Consider” effects
- Means:
 - §110: locate, evaluate, nominate, protect
 - §106: consult 36 C.F.R. pt. 800
- Process
 - 36 C.F.R. part 800
 - [33 C.F.R. part 325, Appendix C]

NHPA, cont.



- '92 Amendments enhanced tribal role
- Consult with tribes regarding religious or cultural sites, wherever located - on or off tribal lands
 - ❑ Traditional Cultural Properties (NPS Bulletin No. 38)
 - ❑ *Pueblo of Sandia* case (50 F.3d 856)
 - ❑ *Muckleshoot Indian Tribe* case (177 F.3d 800)
- Concurrence role on tribal lands
 - ❑ THPO may assume SHPO role
- More recent amendments

Archaeological Resources Protection Act (ARPA, 1979)



- Purpose: Protect archaeological resources on public and Indian lands
 - ❑ 100 year-old remains of past human life of archaeological interest
- Notify tribe before issuing permit affecting any Indian religious or cultural site
 - ❑ If items found, other laws may also apply
- Tribal consent required on Indian lands
- Criminal and civil enforcement provisions
 - ❑ Prohibits trafficking in archaeological resources
 - ❑ Potential felony conviction
- Curation

Native American Graves Protection & Repatriation Act (NAGPRA)



- Purposes:
 - ❑ Establish process for repatriation of human remains and cultural items
 - ❑ Protect remains and cultural items recovered from federal and Indian lands
- Native American human remains & cultural items must be repatriated
 - ❑ Where culturally affiliated
 - ❑ In custody of federal agencies or federally funded museums (Section 5 and 6) or
 - ❑ Inadvertently discovered or intentionally excavated on federal lands (Section 3)

American Indian Religious Freedom Act (AIRFA), 1978



- Protect right to exercise traditional religions
- Act creates no veto power, new substantive rights, nor enforceable procedural duties
- Duty to:
 - Consult with traditional religious leaders
 - Consider American Indian religious values
- *Lyng* case (485 US 455 (1988)) reduced import of the Act

Religious Freedom Restoration Act



- Government may substantially burden the exercise of religion only if there's a compelling government interest and uses the least restrictive means
- *Navajo Nation & Havasupai Tribe v. USFS & Arizona Snowbowl*, 9th Cir., March 12, 2007
 - ❑ San Francisco Peaks sacred to at least 13 tribes
 - ❑ Use of treated sewage effluent to make snow is prohibited

National Environmental Policy Act (NEPA)



- Purpose: Informed, transparent decision-making that considers environmental effects
- Means: Written, public environmental analyses
- Consultation triggers:
 - ❑ Invitation to participate in scoping
 - ❑ Discuss conflicts w/ tribal land use plans and policies
 - ❑ Invitation to comment on draft EIS when effects on Indian lands
 - ❑ Notice of hearings, meetings, and docs when effects...
 - ❑ May be cooperating agency when effects...

Indian Sacred Sites



- Executive Order 13007 (May 24, 1996)
- Obligations:
 - Notice of proposed actions that may limit access to or adversely affect sites
 - Accommodate access to & ceremonial use of Indian sacred sites by Indian religious practitioners
 - Avoid adversely affecting physical integrity of sacred sites

Consultation with Tribal Governments



- Executive Order 13175 (November 6, 2000)
- Obligations:
 - Consult regarding regulations, proposed legislation, or other policy statements that may have substantial effects on tribes
 - Use consensual mechanisms to develop regulations and policies affecting:
 - treaty rights
 - tribal self-government
 - tribal trust resources

Environmental Justice



- Executive Order 12898 (Feb. 11, 1994)
- Purpose: Ensure minority or low-income populations do not suffer adverse environmental effects “disproportionately”
- Means:
 - Greater public participation and access to information
 - Analyze subsistence consumption of fish and wildlife

Other Executive Orders



- Preserve America (E.O. 13287)
 - Partner with Indian tribes to promote economic development through use of historic properties
- Cooperative Conservation (E.O. 13352)
 - Take account of tribal interests in land and other natural resources
 - Promote tribal participation in Federal decision-making

Presidential Memos on Government-to-Government Relations



- President Clinton, April 29, 1994
 - Consult prior to taking actions that may affect tribes
 - Assess effect of actions on trust resources

- President Bush, Sept. 23, 2004
 - Respect tribal rights of self-government and self-determination
 - Cultivate mutual respect

- Both recognize unique legal relationship